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OGC Has Reviewed

LS 6-1461a

7 August 1956

MEMORANDUM FOR: Director of Personnel

SUBJECT : Reemployment Rights of Employees Transferring
to Other Government Agencies

1. Your memorandum of 12 July 1956 requested this Office to render an opinion for general application and guidance as to the applicability or nonapplicability to this Agency of statutes, Executive Orders, and regulations granting reemployment rights.
2. Reemployment rights for employees transferring between Government agencies are authorized by Executive Order 10,577 and Civil Service Regulations issued pursuant thereto (see Departmental Circular 869, dated 27 June 1956) and by section 526 of the Foreign Service Act of 1946, as amended, and section 527 of the Mutual Security Act of 1954, as amended. Discussions with Mr. Hennessey of the Civil Service Commission (Code 171, extension 3276) and Miss Boorady of the General Counsel's Office, ICA (Code 140, extension 2998) have confirmed the opinion of this Office that the Civil Service reemployment program under Executive Order 10,577 and the programs under the Mutual Security and Foreign Service Acts are separate and distinct. The Civil Service Commission does not handle cases arising under the Foreign Service Act or Mutual Security Act and the provisions of the latter Acts are applicable only to persons appointed to the Foreign Service Reserve and ICA.
3. Section 527 of the Mutual Security Act authorizes the Director of ICA to employ or assign officers or employees of other Government agencies and states that persons so employed or assigned shall be entitled to the same benefits as provided in section 526 of the Foreign Service Act. The latter section entitles a Foreign Service Reserve Officer to reinstatement in the Government agency by which he is regularly employed upon termination of his assignment in the Foreign Service. Section 522 of the Foreign Service Act authorizes the Secretary of State to assign as a Reserve officer a person regularly employed in any Government agency, but such assignment is subject to the consent of the head of the agency concerned. It is notable that section 527 of the Mutual Security Act which authorizes assignments to ICA of employees of other Government agencies does not require the consent of the head of the other Government agency.

4. Upon the face of the statute authorizing assignment to ICA and reemployment rights upon termination there appears to be no choice in the hand of the agency from which the employee is being assigned but to permit the transfer with reemployment rights. Although section 10(a) of the CIA Act and section 102(c) of the National Security Act allow this Agency to appoint and terminate employees at will, there is no provision in either Act or any other law affecting this Agency permitting us to refuse the rights granted in section 527 of the Mutual Security Act. The fact that in theory at least we might negate the affect of the latter section by reemployment and immediate termination under the authority of section 102(c) does not in itself allow us to ignore the statutory right granted in the Mutual Security Act. Mr. Hennessey of the Civil Service Commission said that while he was with the Department of the Army some time ago this same problem was faced and it was decided that the Department had no choice but to recognize the reemployment rights set up in the Mutual Security Act. Miss Boonady of ICA said that it is their position that the specific deletion of the requirement of consent on the part of the head of the losing agency operates to make the reemployment rights of the Mutual Security Act absolute.

5. There is a civil case now pending on this question which should be heard in the District Court soon. That case involves an employee of the Department of Commerce assigned to ICA and now seeking reemployment with Commerce on the basis of the rights established by the Mutual Security Act. At the time this employee was appointed to ICA Commerce separated him as surplus to their needs and specifically stated that reemployment rights were not granted. ICA as party defendant with Commerce in this litigation will take the position that no act on their part could grant reemployment rights to a person already separated from his former Agency. The key question, of course, is whether the separation by Commerce will be accepted as a reduction in force made in good faith or considered an attempt to avoid an employee's statutory reemployment rights. If it is considered to be the latter the decision may be made on the point of interest to this Agency, that is, whether or not the reemployment rights established by the Mutual Security Act are absolute. In other words, can the losing agency refuse permission for transfer of the employee to ICA and take separation action or require resignation so as to avoid the reemployment requirements? An argument that may be made in the pending case and which is worthy of consideration is the fact that the reemployment rights programs were set up to aid agencies directly concerned with the national defense to recruit employees for positions temporary in nature. In the case of this Agency it can be argued that transfer to any other Agency is not likely to aid the cause of national defense. In addition, appointments to ICA are indefinite rather than short-term or temporary in nature and thus do not require the reemployment guarantees that temporary positions do as an incentive for recruitment.

6. Miss Boorady said that ICA would not take exception if this Agency continued the policy established in the first case of request for transfer which arose about a month ago. In that case we replied to ICA's letter asking whether we recognized the statutory reemployment rights of the Mutual Security Act by stating that we could not consent to the employee's release when a resultant transfer might bestow upon her a vested right of reinstatement with CIA. In view of ICA's attitude it is recommended that your Office continue to require resignation in cases where it is not desirable to grant reemployment rights. There seems little likelihood of any present difficulty in handling the problem in such a way. Of course at a later date a court decision may require us to revise our policy and in effect may establish reemployment rights for those employees who have already resigned at our request in order to accept positions with ICA.

7. Reemployment rights under Executive Order 10,577 have been considered and discussed with a representative of the Civil Service Commission as noted above. There is no doubt that the program as set forth in Departmental Circular 869 and Civil Service Regulations is applicable to this Agency. Nevertheless its affect upon the Agency should be negligible. Mr. Hennessey of the Civil Service Commission indicated that an attempt is being made to restrict the reemployment rights program as much as possible and to grant rights only where it definitely serves the interest of the national defense. If an employee wishes to take an assignment in an agency coming under the Civil Service program we may refuse reemployment rights and the transfer with such rights will then be postponed pending a decision on the appeal by the Civil Service Commission. Reemployment rights will not be granted in such a case without a good showing of need in the interest of national defense. By the very nature of this Agency it is going to be extremely difficult to show that the national defense will better be served by the transfer of an employee to another Agency.

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Office of General Counsel

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